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PATENT  
Customer No. 22,852  
Attorney Docket No. 05725.0828-00

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: )  
Mireille MAUBRU et al. )  
Application No.: 09/759,530 ) Group Art Unit: 1617  
Filed: January 16, 2001 ) Examiner: S. Wang  
For: DETERGENT COSMETIC )  
COMPOSITIONS COMPRISING A ) Confirmation No.: 2122  
SPECIFIC AMPHOTERIC )  
STARCH, AND USES THEREOF )

**Attention: Mail Stop Appeal Brief-Patents**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**RESPONSE TO NOTIFICATION OF**  
**NON-COMPLIANT APPEAL BRIEF (37 C.F.R. § 41.37(d))**

In reply to the Notification of Non-Compliant Appeal Brief mailed September 27, 2006, Appellants respectfully request consideration of the Amended Appeal Brief attached hereto and the following Remarks.

**Attachment to this Response:** Amended Appeal Brief Under Board Rule §41.37.

**REMARKS**

In response to the Notification of Non-Compliant Appeal Brief mailed September 27, 2006, Appellants provide the attached Amended Appeal Brief. In particular, this brief corrects the "Claims Appendix to Appeal Brief Under Rule 41.37(c)(1)(viii)" section of the Appeal Brief. Specifically, this section has been amended to only include the appealed claims and to remove the status identifiers.

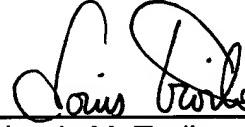
Accordingly, Appellants submit that the attached Amended Appeal Brief corrects the informalities in the original Appeal Brief filed on September 15, 2006. Appellants respectfully request reconsideration of this Amended Appeal Brief.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

Dated: October 5, 2006

By:   
\_\_\_\_\_  
Louis M. Troilo  
Reg. No. 45,284

**Attachment:** Amended Appeal Brief Under Board Rule §41.37



PATENT  
Attorney Docket No. 05725.0828-00

UNITED STATES PATENT AND TRADEMARK OFFICE

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**Attention: Mail Stop Appeal Brief-Patents**

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Sir:

**AMENDED APPEAL BRIEF UNDER BOARD RULE §41.37**

Appellants file this Amended Appeal Brief in response to the Notification of Non-Compliant Appeal Brief dated September 27, 2006, which indicates that Appellants' brief was non-compliant because the claim appendix included claims not involved in the appeal and included status identifiers. This Amended Appeal Brief, which is filed in support of the Notice of Appeal filed May 22, 2006, addresses these issues. Appellants enclosed with the initial brief filed on September 15, 2006 a check for the fee of \$500.00 required under 37 C.F.R. §41.20(b)(2), thus a fee is not submitted herewith. However, please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

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U.S. Application Serial No.: 09/759,530  
Attorney Docket No.: 05725.0828-00

I. Real Party in Interest

L'Oréal S.A. is the real party in interest, as indicated by the assignment in its name, recorded in the U.S. Patent and Trademark Office on April 27, 2001, at Reel 011738, Frame 0090.

**II. Related Appeals and Interferences**

There are currently no other appeals or interferences, of which Appellant, Appellant's legal representative, or Assignee are aware, that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**III. Status Of Claims**

Claims 1-10, 12-18, 20-34 and 37-44 are pending in this application

Claims 11, 19, 35, and 36 have been cancelled.

Claims 13, 15, 23-29, and 37-44 have been withdrawn from consideration by the Examiner.

Claims 1-10, 12, 14, 16-18, 20-22, and 30-34 have been finally rejected by the Examiner, and Appellants appeal the rejection of those claims. Further to 37 C.F.R. §41.37(c)(1)(iii) and (viii), the attached Appendix contains a clean copy of the claims involved in the appeal.

**IV. Status Of Amendments**

All amendments have been entered. No amendments under 37 C.F.R. §1.116 have been filed.



**V. Summary of Claimed Subject Matter**

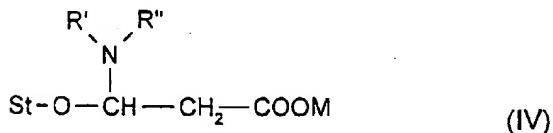
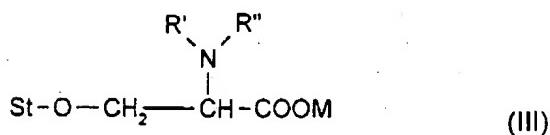
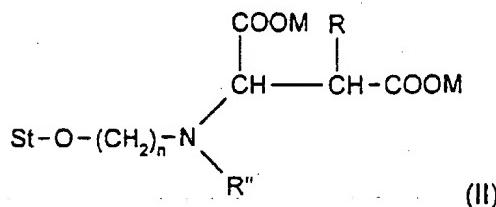
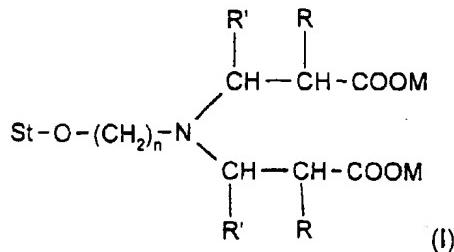
The claimed invention relates to novel cosmetic compositions with improved properties, intended both for cleaning and conditioning keratin materials, such as the hair, and comprising, in a cosmetically acceptable aqueous medium, a washing base and at least one amphoteric starch. Specification, page 1. The claimed invention also relates to the use of such cosmetic compositions. *Id.*

It is known practice to use detergent compositions, e.g. shampoos based on surfactants such as anionic, nonionic and amphoteric surfactants to clean and wash keratin materials such as the hair. *Id.* Typically, these compositions are applied to wet hair and the lather generated by massaging or rubbing with the hands makes it possible to remove, after rinsing with water, the various types of soiling initially present on the hair. *Id.*

While the use of an amphoteric starch with soap is also known in the art of shaving foam compositions, prior to the present disclosure, these combinations were not known to have sufficient detergent properties so as to be useful for the washing of keratin fibers. *Id.* at 2. In fact, it was expected that such a combination resulted in deleterious effects, including dulling of the fiber when used in hair care compositions. *Id.*

After considerable research in this area, Appellants have discovered that by using a washing base and at least one amphoteric starch, it is possible to obtain a composition that not only has at least one excellent cosmetic property, such as ease of styling, lightness and suppleness of treated hair, but also has at least one good working property, such as good intrinsic washing power and good foaming power. *Id.*

Therefore, one aspect of the present invention is a detergent and conditioning cosmetic composition comprising, in a cosmetically acceptable aqueous medium, a washing base and at least one amphoteric starch of the formulae:



wherein the substituents are defined as in, e.g., claim 1. In addition, the claimed composition is a detergent and conditioning composition further comprising at least one cationic polymer and at least one silicone, and is free of fatty acid soaps. *Id.* at pages 3, 9 and 10, and claim 1. As used with respect to the present invention, the term, "fatty acid soap" refers to salts of alkali metals, salts of alkaline-earth metals, fatty amines, and C<sub>10</sub>-C<sub>18</sub> fatty acids. *Id.* at 3.

As described, the claimed compositions are suitable for washing and caring for keratin materials, such as the hair and the skin, and thus may be used as shampoos for

washing and conditioning the hair, as well as shower gels for washing and conditioning the hair and skin. *Id.* The claimed invention further comprises a process for washing and conditioning keratin materials such as the hair, which comprises applying an effective amount of the claimed composition to keratin materials. *Id.*

For the reasons of record, which are expanded on below, the art of record neither describes the claimed compositions, nor the claimed methods of using them.

**VI. Grounds of Rejection to be Reviewed On Appeal**

Claims 1-10, 12, 14, 16-18, 20-22 and 30-34 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,482,704 to Sweger et al. ("Sweger") and U.S. Patent No. 6,277,893 to Babenko ("Babenko"), in view of U.S. Patent No. 5,919,438 to Saint-Leger ("Saint-Leger") and U.S. Patent No. 5,720,964 to Murray ("Murray").

## VII. Arguments

Each claim of the present application is separately patentable, and upon issuance of a patent will be entitled to a separate presumption of validity under 35 U.S.C. §282.

### A. Summary of the Examiner's Position

The Examiner acknowledges that the primary references (Sweger and Babenko) do not teach expressly a composition comprising “alkyl ether sulfate, the particular cationic polymer, polydimethylsiloxane, and coconut monoisopropanolamide and without fatty acid soap.” Office Action mailed December 21, 2005 at 3. In an attempt to cure these deficiencies, the Examiner turns to Saint-Leger and Murray. *Id.* According to the Examiner, “Murray teaches a shampoos composition comprising alkyl ether sulfates, e.g., sodium lauryl ether sulfate, silicone emulsion, cationic polymers, such as polymer JR 400, and a thickener.” *Id.* (citing the abstract and column 3, line 36-column 6 line 45 of Murray). Further, the Examiner asserts that “Saint-Leger teaches that coconut monoisopropanolamide is particularly useful in shampoo composition[s], particularly with alkyl ether sulfate.” *Id.* (citing column 4, example 1 of Saint-Leger). The Examiner also states that “none of the primary references require the [presence] of fatty acid soap when amphoteric starch is used.” *Id.*

The Examiner concludes that it would have been obvious to at the time the claimed invention was made to employ the starch derivatives as emulsion stabilizer or thickener (as taught by Sweger et al. and Babenko) to make a cosmetic emulsion composition, and incorporate cosmetic ingredients, which the Examiner asserts are

conventional, to formulate cosmetic compositions, such as shampoo, and without using fatty acid soap. *Id.* This conclusion is based on the Examiner's position that one would have been motivated to employ the starch derivatives as emulsion stabilizer or thickener (as taught by Sweger et al. and Babenko) because such starch derivatives have excellent aesthetic properties of skin feel and appearance, and are superior to conventional thickeners or emulsion stabilizer. *Id.* According to the Examiner, the use of the claimed ingredients, such as alkyl ether sulfate, in a cosmetic composition would have been obvious because these ingredients are old and well-known cosmetic ingredients, particularly in shampoo composition. *Id.* at 4.

Appellants respectfully disagree with and traverse this rejection for at least the following reasons.

## B. Appellant's Arguments

To establish a *prima facie* case of obviousness, three criteria must be met: (1) there must be some suggestion or motivation to combine the reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art references must teach or suggest all the claim limitations. M.P.E.P. § 2143 (8th ed., Rev. 2, 2004). With regard to the suggestion or motivation to combine the reference teachings, the Federal Circuit has stated on numerous occasions that inventions are typically new combinations of existing principles or features. *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457 (Fed. Cir. 1998).

For example, in *Rouffet*, the Federal Circuit explained that an examiner may find every element of the claimed invention in the prior art, but mere identification of each

element in the prior art is not enough to negate patentability. *Id.* at 1357, 47 U.S.P.Q.2d at 1357. Rather, “the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner as claimed.” *Id.*, 47 U.S.P.Q.2d at 1458. In the present application, however, the Examiner has failed to meet these burdens, for at least the following reasons.

### **1. The Prior Art Does Not Teach Or Suggest All Claim Elements**

Contrary to the requirements for establishing obviousness, the Examiner has not established that the applied prior art teaches or suggests all elements of claims 1-10, 12, 14, 16-18, 20-22, and 30-34. See M.P.E.P. §2143.03 (“All words in a claim must be considered in judging the patentability of that claim against the prior art.”) (citations omitted) (emphasis added).

For example, each of the pending independent claims (and thus, indirectly, all of the dependent claims) recite, *inter alia*, a cosmetic composition comprising: a) an aqueous medium; b) a washing base; c) at least one amphoteric starch chosen from the starches recited in formulae (I) to (IV); d) at least one cationic polymer; and e) at least one silicone; wherein said composition is a detergent and conditioning composition that is free from fatty acid soaps. See, e.g., claim 1. These elements are further demonstrated in a non-limiting manner, in the Examples of the specification.

According to the Examiner, Sweger “discloses a composition, which comprises substantial amount of detergent.” Office Action mailed September 17, 2003, page 3 (citing Example VI of Sweger). Moreover, the Examiner states that “[n]owhere in

Sweger et al. teach the cosmetic composition therein has to comprising fatty acid soap."

Office Action mailed May 24, 2004, page 3.

Further, the Examiner states that because "Babenko teaches that the oil-in-water emulsions are particularly useful in cosmetic...composition[s] such as...shampoos...It would have been obvious to employ the emulsion of Babenko for a shampoo composition, and shampoo compositions contain washing base or detergents." Office Action mailed September 17, 2003, page 3. Appellants respectfully disagree with the Examiner for at least the reasons of record.

Specifically, the only support for the Examiner's assertion that Sweger "discloses a composition that comprises a substantial amount of detergent" is found in Example VI of the reference. *See* Sweger, column 11, example VI and the Office Action mailed September 17, 2003, page 3 (citing Example VI of Sweger). As Appellants explained in the Response filed March 12, 2004, however, example VI of Sweger contains stearic acid and triethanolamine, the combination of which forms fatty acid soap. *See* Response filed March 14, 2004, page 3. Thus, the only evidence in Sweger that supports the Examiner's assertion that the reference "discloses a composition that comprises a substantial amount of detergent" also contains fatty acid soap, which is expressly excluded from the claimed invention. *See* the Office Action mailed, September 17, 2003 (citing example VI of Sweger).

Indeed, example VI of Sweger contains 13% by weight of fatty acid soap, relative to the total weight of the composition. *See* Sweger, column 11, example VI and the Response filed March 12, 2004, page 4. In contrast, the present claims require a composition that is "free of fatty acid soaps." The phrase, "free of fatty acid soaps," is

defined in the specification as indicating that fatty acid soap may be present in an amount ranging from 0-1% by weight, relative to the total weight of the composition. See specification, page 3.

Babenko is equally flawed in that it expressly incorporates the disclosure of Sweger by reference (at column 3, lines 20-53), and thus also teaches compositions comprising ingredients that form fatty acid soaps. *See, also* Response filed March 12, 2004 at page 2. Appellants note that “a reference must be considered not only for what it expressly teaches, but also for what it fairly suggests.” Office Action mailed September 17, 2003, page 3; Response filed November 24, 2004, page 3; and *In re Burckel*, 201 U.S.P.Q. 67, 70 (C.C.P.A. 1979).

As Sweger and Babenko clearly teach away from the claimed compositions, which are free from fatty soaps, they do not, either alone or in combination, render the claimed invention obvious. *See, e.g., In re Gurley*, 27 F.3d 551, 31 U.S.P.Q.2d 1130 (Fed. Cir. 1994) (holding that “a reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.”).

Saint-Leger and Murray do not cure the deficiencies of Sweger and Babenko. Indeed, the Examiner admittedly relies on these references for teaching the claimed cationic polymer and silicone, and not for any teachings related to a composition that is free from fatty soaps. *See* Office Action mailed December 21, 2005, page 3. For at least the forgoing reasons, Appellants maintain that the applied prior art, among other things, fails to teach or suggest all of the limitations of the claims. *See* M.P.E.P. §2143;

Response filed November 24, 2004, page 3. Thus, the applied rejection of Claims 1-10, 12, 14, 16-18, 20-22 and 30-34 under 35 U.S.C. §103(a) as being unpatentable over Sweger, Babenko, Saint-Leger, and Murray is improper, and should be withdrawn.

## **2. There Is No Motivation To Make The Proposed Modification**

Appellants further maintain that the Examiner has not established that the applied prior art provides some teaching or suggestion that would motivate one of ordinary skill in the art to make the proposed modification -- to include the claimed at least one cationic polymer and at least one silicone in a cosmetic composition comprising the claimed amphoteric starch and which is free of fatty acid soap -- with a reasonable expectation of success. *See M.P.E.P. §2143.*

Several well-known Federal Circuit decisions hold that if a proposal for modifying the prior art in an effort to attain the claimed invention causes the art to become inoperable or destroys its intended function, then the requisite motivation to make the modification would not have existed. See, *In re Fritch*, 972 F.2d 1260, 1265-66, 23 U.S.P.Q.2d 1780, 1783 (Fed. Cir. 1992); *In re Ratti*, 270 F.2d 810, 813, 123 U.S.P.Q. 349, 352 (C.C.P.A. 1959) (holding the suggested combination of references improper under section 103 because it "would require a substantial reconstruction and redesign of the elements shown in [a prior art reference] as well as a change in the basic principles under which [that reference's] construction was designed to operate.").

Therefore, with respect to the present Application, the Examiner's reliance on Saint-Leger and Murray for teaching the claimed at least one cationic polymer and the

claimed at least one silicone (at Office Action mailed December 21, 2005, page 3), does not cure the fundamental defects in the primary references. Rather, any modification of the primary references, which exemplify compositions containing fatty acid soaps, to obtain compositions that are “free of fatty acid soaps,” would necessarily contravene the teaching of these references. See Response filed March 12, 2004, page 4. In addition, because it is improper to combine references if the combination would result in the destruction of the intended operation or if any references teach away from the claimed invention, this rejection is further deemed improper. *In re Laskowski*, 10 U.S.P.Q.2d 1397 (Fed. Cir. 1989).

Further, the Federal Circuit has recognized that “virtually all elements are combinations and virtually all are combinations of old elements.” *Environmental Designs, Ltd. v. Union Oil Co.*, 218 U.S.P.Q. 865, 870 (Fed. Cir. 1983). However, it is not sufficient to merely “find every element of a claimed invention in the prior art [and for] an examiner to use the claimed invention itself as a blueprint for piecing together elements...Such an approach would be an illogical and inappropriate process by which to determine patentability.” *In re Rouffet*, 47 U.S.P.Q.2d 1473, 1457 (Fed. Cir. 1998) (citations and quotations omitted). Rather, some suggestion or motivation is necessary, e.g., from the prior art references themselves, the knowledge of one of ordinary skill in the art, or in some cases, from the nature of the problem to be solved. See *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.*, 37 U.S.P.Q.2d 1626, 1630 (Fed. Cir. 1996).

In the present case, however, the Examiner has failed to establish that there is some objective teaching or suggestion, aside from within Appellant’s own disclosure, to combine the cited references in the manner asserted. Indeed, the Examiner’s entire

argument is predicated on the assertion that, "all these ingredients are old and well-known cosmetic ingredients, particularly in shampoo composition[s]." Office Action mailed December 21, 2004, page 4. This rationale does not, however, amount to objective evidence of a teaching or suggestion that would motivate one of ordinary skill in the art to combine the cited references in the manner asserted. Rather, it is mere conjecture, which does not suffice under §103. As noted in *Ex Parte Levengood*, 28 U.S.P.Q.2d 1300 (Bd. Patent App. & Inter. 1993) and M.P.E.P. §2143,

[a] statement that modifications of the prior art to meet the claimed invention would have been well within the ordinary skill of the art at the time the claimed invention was made because the references relied upon teach that all aspect of the claimed invention were individually known in the art is not sufficient to establish a prima-facie case of obviousness without some objective reason to combine the teachings of the references.

Moreover, the rationale employed by the Examiner in the present application -- that it would be obvious to utilize various claimed components simply because they are well-known -- would preclude any invention using a combination of known cosmetic ingredients, essentially requiring every cosmetic composition to be made from previously unknown ingredients. As such, the Cosmetic Ingredient Dictionary and Handbook, which identifies numerous well-known cosmetic ingredients as well as properties associated with those ingredients, could be used to defeat the patentability of almost all cosmetic inventions, simply because it recites such a listing. Not only is this type of reasoning illogical, it is exactly the type of rationale the Federal Circuit struck down in *Environmental Designs* and *In re Rouffet*, as explained above. See *Environmental Designs, Ltd.*, 218 U.S.P.Q. at 870; *In re Rouffet*, 47 U.S.P.Q.2d at 1457.

Moreover, it is well established that it is impermissible to establish a *prima facie* case of obviousness based upon selective picking and choosing from each of several references in order to create the claimed invention, while impermissibly ignoring the art as a whole. *In re Wesslau*, 147 U.S.P.Q. 391, 393 (C.C.P.A. 1965) (holding that “[i]t is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art.”).

The rationale utilized by the Examiner in the Office Action mailed December 21, 2005, however, clearly demonstrates that the Examiner is selectively picking and choosing from the applied references without considering their teachings as a whole. Specifically, according to the Examiner’s reasoning, a person of ordinary skill in the art would have to:

1. Look to Sweger and Babenko to teach a cosmetic composition comprising the claimed amphoteric starch;
2. In Sweger, ignore the particular teachings that recite ingredients generating fatty acid soaps, e.g. Example VI, although Sweger fails to provide any guidance or selection criteria to do so;
3. In Babenko, ignore the particular teachings directed to surfactants or emulsifying agents (e.g. Babenko teaches emulsions containing a cationic polysaccharide and dimethicone copolyol in an oil phase), further ignore the express assertion that “classical type surfactants or emulsifying agents [which] can cause skin irritation or allergic reactions and [also] may not be compatible with other constituents in

the emulsion formulation" to incorporate the washing base, such as a surfactant, into the composition. See Babenko, column 1, lines 28-32; and

4. Look to the secondary references of Saint-Leger and Murray for the specific cosmetic ingredients of alkyl ether sulfate, and the particular cationic polymer, polydimethylsiloxane and coconut isopropanolamide, despite no clear direction, except that provided by Appellant's disclosure that such components should be combined with the claimed amphoteric starch, particularly in the absence of fatty acid soap.

This series of steps hardly seem obvious, especially in view of well-established case law holding it "impermissible within the framework of Section 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art." *In re Wesslau*, 353 F.2d 238, 241, 147 U.S.P.Q. 391, 393 (C.C.P.A. 1965). In essence, the Office's rejection is based on selective picking and choosing from each of several references in order to arrive at the claimed invention, while impermissibly ignoring the art as a whole.

Given the numerous steps and substitutions required to arrive at the presently claimed invention, the combination of references fails to establish a *prima facie* case of obviousness.

Moreover, it is impermissible for the Examiner to use an applicant's specification as the basis for selecting particular components from cited prior art. *The Gillette Co. v. S.C. Johnson & Son, Inc.*, 16 U.S.P.Q.2d 1923 (Fed. Cir. 1990). In *Gillette*, the Federal Circuit rejected several arguments that a four-component shaving composition, which differed from the prior art composition only with respect to a single element (an oil

soluble jellifying agent in the prior art (Bluard) composition and a water-soluble jelling agent, such as cellulose-based polymers, in Johnson's claimed composition), was obvious. They did so by rejecting arguments focused on mere substitutions of components and alleged generalized advantages. First, the Court held that although all four of Johnson's claimed components were known, “[w]hat was not known or suggested, however, was the composition that resulted from the combination of those components, and its unique properties.” *Gillette* at 1928. Thus, the argument “[f]ocusing on the obviousness of substitutions and differences, instead of the invention as a whole, is a legally improper way to simplify the often difficult determination of obviousness.” *Id.* at 1927 (citations omitted). Second the Court rejected the “argument that other art-recognized advantages of cellulose based polymers, namely lubricity and consistency enhancement, provide the suggestion sufficient to motivate the art worker to substitute them from Bluard's [oil soluble jellying agent]. This theory boils down to no more than hindsight reconstruction.” *Id.* at 1929.

Similarly, in the present case, what was not known was a composition comprising a washing base, at least one amphoteric starch chosen from the compounds of formulae I-IV recited in claim 1, at least one cationic polymer, and at least one silicone, and its unique properties. Thus, as in *Gillette*, even though the claimed components may be known individually, the claimed composition is not obvious based on unsupported mixing and matching of known components. Rather, “[w]hen determining the patentability of a claimed invention which combines two known elements, the question is whether there is something in the prior art as a whole to suggest the

desirability, and thus the obviousness, of making the combination." *In re Beattie*, 24 U.S.P.Q.2d 1040, 1042 (Fed. Cir. 1992) (quotations and citations omitted).

In the present case, however, there is no evidence (or even an allegation) that there is some teaching in the prior art that would motivate one of ordinary skill in the art to make the proposed modification, other than the mere possibility of substitution of components, which, as stated above, does not constitute motivation. *See Gillette*, at 1929. Indeed, but for the disclosure of the present application, there is no evidence of record suggesting the Examiner's proposed combination.

For at least the foregoing reasons, Appellants maintain that the Examiner has failed to establish that the applied prior art provides some teaching or suggestion that would motivate one of ordinary skill in the art to combine the teachings of the references so as to arrive at the claimed cosmetic composition with a reasonable expectation of success. Thus, the applied rejection of Claims 1-10, 12, 14, 16-18, 20-22 and 30-34 under 35 U.S.C. §103(a) as being unpatentable over Sweger, Babenko, Saint-Leger, and Murray is improper, and should be withdrawn.

**VIII. Conclusion**

For the foregoing reasons, pending claims 1-10, 12, 14, 16-18, 20-22, and 30-34 are allowable and reversal of the Examiner's rejection is respectfully requested. The Examiner has failed to establish a prima facie case of obviousness at least because the applied prior art does not: a) teach or suggest all of the limitations of the claims; or b) provide some teaching or suggestion that would motivate one of ordinary skill in the art to make the combination proposed by the Examiner with a reasonable expectation of success.

To the extent any extension of time under 37 C.F.R. §1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. §1.136, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

Dated: October 5, 2006

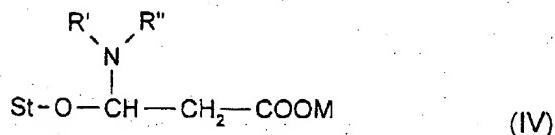
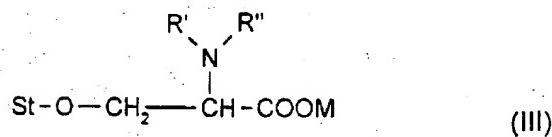
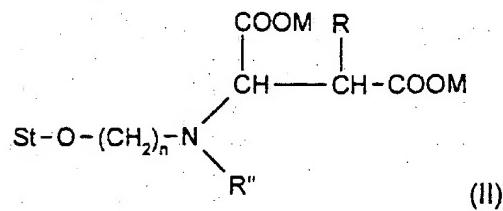
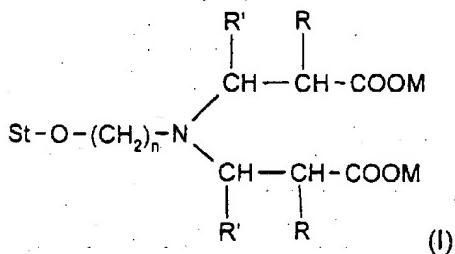
By:   
Louis M. Troilo  
Reg. No. 45,284



Application No.: 09/759,530  
Attorney Docket No.: 05725.0828-00

**Claims Appendix to Appeal Brief Under Rule 41.37(c)(1)(viii)**

1. A cosmetic composition comprising, in a cosmetically acceptable aqueous medium, a washing base and at least one amphoteric starch chosen from the compounds of formulae (I) to (IV):



wherein:

-St-O is a starch moiety;

-R, which may be identical or different, are each chosen from a hydrogen atom and a methyl group;

-R', which may be identical or different, are each chosen from a hydrogen atom, a methyl group, and a -COOH group;

-n is chosen from integers ranging from 2 to 3;

-M, which may be identical or different, are each chosen from a hydrogen atom, an alkali metal, an alkaline-earth metal, NH<sub>4</sub>, quaternary ammonium compounds, and organic amines; and

R'', which may be identical or different, are each chosen from a hydrogen atom and alkyl groups having from 1 to 18 carbon atoms,

wherein said composition is a detergent and conditioning composition further comprising at least one cationic polymer and at least one silicone, and wherein said composition is free of fatty acid soaps.

2. A composition according to claim 1, wherein said at least one amphoteric starch is chosen from the compounds of formula (I) and (II).

3. A composition according to claim 2, wherein R, R' and R'' are hydrogen and n is equal to 2.

4. A composition according to claim 1, wherein said washing base comprises at least one surfactant chosen from anionic, amphoteric and nonionic surfactants.

5. A composition according to claim 1, wherein said washing base comprises at least one anionic surfactant.

6. A composition according to claim 1, wherein said washing base is present in an amount ranging from 4% and 50% by weight, relative to the total weight of the composition.

7. A composition according to claim 6, wherein said washing base is present in an amount ranging from 6% to 35% by weight, relative to the total weight of the composition.

8. A composition according to claim 7, wherein said washing base is present in an amount ranging from 8% to 25% by weight, relative to the total weight of the composition.

9. A composition according to claim 1, wherein said at least one amphoteric starch is present in an amount ranging from 0.01% to 10% by weight, relative to the total weight of the composition.

10. A composition according to claim 9, wherein said at least one amphoteric starch is present in an amount ranging from 0.1% to 5% by weight, relative to the total weight of the composition.

12. A composition according to claim 1, wherein said at least one cationic polymer is chosen from quaternary cellulose ether derivatives, cationic cyclopolymers, cationic polysaccharides, quaternary polymers of vinylpyrrolidone and quaternary polymers of vinylimidazole.

14. A composition according to claim 12, wherein said quaternary cellulose ether derivatives are chosen from hydroxyethylcelluloses which have reacted with an epoxide substituted with a trimethylammonium group.

16. A composition according to claim 1, wherein said at least one cationic polymer is present in an amount ranging from 0.001% to 10% by weight, relative to the total weight of the composition.

17. A composition according to claim 16, wherein said at least one cationic polymer is present in an amount ranging from 0.005% to 5% by weight, relative to the total weight of the composition.

18. A composition according to claim 17, wherein said at least one cationic polymer is present in an amount ranging from 0.01% to 3% by weight, relative to the total weight of the composition.

20. A composition according to claim 1, wherein said at least one silicone is chosen from non-volatile polyorganosiloxanes.

21. A composition according to claim 20, wherein said non-volatile polyorganosiloxanes are chosen from polyalkylsiloxanes, polyarylsiloxanes, polyalkylarylsiloxanes, silicone gums, silicone resins, and polyorganosiloxanes modified with organofunctional groups.

22. A composition according to claim 21, wherein said polyalkylsiloxanes are chosen from polydimethylsiloxanes comprising trimethylsilyl end groups, polydimethylsiloxanes comprising dimethylsilanol end groups, and poly(C<sub>1</sub>-C<sub>20</sub>)alkylsiloxanes.

30. A composition according to claim 19, wherein said at least one silicone is chosen from polyalkyl siloxanes comprising trimethylsilyl end groups, polyalkylsiloxanes comprising dimethylsilanol end groups, polyalkylarylsiloxanes, combinations of polydimethylsiloxanes comprising at least one gum and at least one oil of different viscosities, combinations of organosiloxanes and cyclic silicones, and polyorganosiloxane resins.

31. A composition according to claim 1, wherein said at least one silicone is

present in an amount ranging from 0.001% to 20% by weight, relative to the total weight of the composition.

32. A composition according to claim 31, wherein said at least one silicone is present in an amount ranging from 0.01% and 10% by weight, relative to the total weight of the composition.

33. A composition according to claim 1 further comprising at least one additive chosen from C<sub>10</sub>-C<sub>18</sub> 1, 2, alkanediols and fatty alkanolamides derived from monoethanolamine, C<sub>10</sub>-C<sub>18</sub> 1,2 alkanediols and fatty alkanolamides derived from diethanolamine, silicone sunscreens, non-silicone sunscreens, cationic surfactants, anionic polymers, nonionic polymers, amphoteric polymers, proteins, protein hydrolysates, ceramides, pseudoceramides, fatty acids comprising at least one chain chosen from linear and branched C<sub>12</sub>-C<sub>40</sub> chains, 18-methyleicosanoic acid, hydroxy acids vitamins, provitamins, panthenol, plant oils, animal oils, mineral oils and synthetic oils.

34. A composition according to claim 33, wherein said at least one additive is present in an amount ranging from greater than 0% to 20% by weight, relative to the total weight of the composition.

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**Evidence Appendix to Appeal Brief Under Rule 41.37(c)(1)(ix)**

There is no extrinsic evidence being cited or relied upon by Appellants in this case.

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**Related Proceedings Appendix to Appeal Brief Under Rule 41.37(c)(1)(x)**

There are no related Appellate proceedings or decisions to be cited in this case.